

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

MICROSOFT CORPORATION, et al.,

Defendants.

Case No. 23-cv-02880-JSC

**ORDER RE: EVIDENTIARY
HEARING ON PRELIMINARY
INJUNCTION MOTION**

The Federal Trade Commission (FTC) brings this action for provisional relief pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), seeking to enjoin Defendants Microsoft and Activision from consummating a proposed transaction while the FTC’s administrative review of the transaction is pending. On June 13, 2023, the Court granted the FTC’s motion for a temporary restraining order and set an evidentiary hearing on Plaintiff’s motion for a preliminary injunction for June 22 and 23, 2023. (Dkt. No. 37.)

Section 13(b) of the Federal Trade Commission Act provides that “[u]pon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest ... a preliminary injunction may be granted....” 15 U.S.C. § 53(b). “Section 13(b) places a lighter burden on the Commission than that imposed on private litigants by the traditional equity standard; the Commission need not show irreparable harm to obtain a preliminary injunction.” *F.T.C. v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984) (internal citation omitted). “In determining whether to grant a preliminary injunction under section 13(b), a court must 1) determine the likelihood that the Commission will ultimately succeed on the merits and 2) balance the equities.” *Id.* (citing *Federal Trade*

Commission v. Simeon Management Corp., 532 F.2d 708, 713–14 (9th Cir. 1976)). The government can meet “its burden of demonstrating a likelihood of success by presenting evidence sufficient to raise serious, substantial, difficult questions regarding the anticompetitive effects of the proposed [transaction].” *Warner Commc’ns*, 742 F.2d at 1164 (cleaned up).

A. Joint Statement

In anticipation of the evidentiary hearing, the parties must meet and confer in person or by videoconference regarding the presentation of evidence and any other matters necessary to ensure efficient presentation of the issues. Then, on or before noon on Tuesday, June 20, 2023, the parties shall file a joint statement setting forth the following:

1. A list identifying each witness each party intends to call, the subject-matter of the testimony, and the anticipated length of the direct and cross-examination.¹ The Court encourages the parties to agree to present direct testimony, where possible, by declaration and have the live testimony be only cross-examination and re-direct.
2. A list identifying each exhibit each party intends to offer at the evidentiary hearing either through a witness declaration or live testimony. The list should also identify which exhibits are subject to a confidentiality designation and where on the docket the Court can locate a declaration in support of sealing as required by Local Rule 79-5. The parties are cautioned that the Court strongly disfavors closing the courtroom for any portion of the evidentiary hearing.

B. Proposed Findings of Fact and Conclusions of Law

On or before the close of business on Tuesday, June 20, 2023, each party shall submit initial proposed findings of fact and conclusions of law. Following the close of evidence, the Court will set a deadline for submission of final proposed findings of fact and conclusions of law, but anticipates they will be due no later than two days following the end of the evidentiary hearing.

C. Pre-Hearing Status Conference

¹ Microsoft and Activision shall specify whether they intend to call witnesses jointly or separately.

The Court will hold a pre-evidentiary hearing status conference on Wednesday, June 21, 2023 at 2:00 p.m. in Courtroom 8, 450 Golden Gate Ave., San Francisco, California.

D. Evidentiary Hearing Schedule

The evidentiary hearing will commence on Thursday, June 22, 2023 at 8:30 a.m. and will continue on June 23, 2023, June 27, 2023, June 28, 2023 (in the afternoon), and June 29, 2023, as needed. The Court anticipates each court day will end around 3:00 p.m.

E. Preliminary Injunction Briefing Schedule

The briefing schedule previously set remains in effect. (Dkt. No. 37.)

This Order disposes of Docket No. 56.

IT IS SO ORDERED.

Dated: June 14, 2023


JACQUELINE SCOTT CORLEY
United States District Judge